



# Commonwealth of Massachusetts State Ethics Commission

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## CONFLICT OF INTEREST OPINION EC-COI-92-29

### FACTS:

You are a member of ABC Housing Authority (ABC). Chapter 121B of the General Laws sets up a structure whereby a housing authority compensates its members based upon a percentage of the rents from projects commenced prior to a certain date. The Executive Office of Communities and Development (EOCD), as the funding agency for housing authorities, pursuant to statute, is required to include such amounts in an authority's budget authorizations. In your opinion, EOCD has failed to comply with this requirement. The ABC is contemplating a lawsuit in which it will seek to enforce its statutory and contractual rights. The ABC, as plaintiff in the lawsuit, seeks to utilize its legal counsel. Although individual Members may implead as plaintiffs, it is not foreseen that the individuals will be represented by ABC's legal counsel.

Additionally, each Member has filed individually with the Town Retirement Board (Board) for membership and has been rejected by the Board. Each Member, using private legal counsel, has individually appealed this rejection. The case of one of the Members has already been decided by the Contributory Retirement Appeals Board in favor of acceptance and has been returned to the Board for consideration and compliance with the Board's own regulations. The ABC now intends to have its legal counsel represent all of its present and future special municipal employees, which includes the individual Member referred to above, with regard to the limited issue of the Board's compliance with its regulations and the eligibility for membership of ABC's special municipal employees. Any other issues of specific concern to the individual Member will be handled by the Member's private counsel.

According to the ABC, a number of benefits are conferred upon it by having its counsel prosecute this limited issue. Specifically you state that public policy requires that the employer seek to uphold statutorily granted rights common to classes of its employees. You further state that pursuit by the ABC of retirement benefits for its employees will encourage loyalty and foster a sense of common cause throughout the ABC, leading to better job performance by all employees. Also, you state that with regard to the position of Member, the availability of retirement benefits would encourage more and better qualified persons to run for this office. Finally, you state that the ABC would be protecting its employees from a discriminatory application of the law in that numerous similarly situated employees in Town and neighboring towns are allowed membership in the retirement system.

### QUESTIONS:

1. Does G.L. c. 268A permit legal counsel for the ABC to pursue a lawsuit on behalf of the ABC against EOCD with regard to the fee used for compensating the Members?
2. Does G.L. c. 268A permit counsel for the ABC to represent an individual Member with regard to the limited issue of the Board's compliance with its own regulations and the eligibility of all ABC special municipal employees to be members of the local retirement system?

### ANSWERS:

1. Yes.
2. Yes.

### DISCUSSION:

The ABC's legal counsel is a municipal employee for purposes of the conflict of interest law.<sup>1/</sup> Section 17(c) generally prohibits a municipal employee, otherwise than in the proper discharge of his official duties, from acting as agent or attorney for anyone other than the municipality or a municipal agency in connection with any particular matter<sup>2/</sup> in which the municipality is a party or has a direct and substantial interest.

We must therefore determine whether the involvement of the ABC legal counsel in the two proposed actions would constitute a proper part of the official duties of the legal counsel. In that regard, we have previously held that G.L. c. 268A provides latitude to an employee's appointing official to determine what will constitute the proper discharge of official duties, and the Commission will customarily defer to the appointing official's discretion. However, the Commission has also previously held that an appointing official's discretion is not unlimited.

Thus, in *EC-COI-83-137* the Commission decided that legal counsel for the chairman of a committee of the General Court could not file a lawsuit on behalf of plaintiffs (the chairman and other members of the Committee, and their employees), in their private capacity as residents of the Commonwealth, challenging a law which would affect them as private individuals.<sup>3/</sup> The Commission found that as a legislative employee, the attorney's responsibilities included research and drafting services for the Committee. The Commission went on to state that those responsibilities could reasonably extend to representing individuals in their capacity as legislators in a court suit, for example challenging a particular law or regulation as it affects the legislators or leadership in their official capacity. However, in that particular case, the Commission found that there was no "distinct institutional interest" which would be served by pursuing the lawsuit, and therefore the attorney's representation of the Chairman and other members of the Committee was prohibited by §17(c). *See also EC-COI 88-17; compare EC-COI-85-73* (consultant to Attorney General could concurrently represent creditors committee where purpose for employment by Attorney General could not be achieved without such representation of the committee); *EC-COI-83-20* (an attorney employed in the legal department of a state agency may represent a former employee of the agency, for no compensation beyond his own salary, in connection with matters arising from the former employee's actions as a state official, as such representation is within the proper discharge of his official duties as determined by his superiors).<sup>4/</sup>

With regard to the first proposed lawsuit to be brought against the EOCD to enforce the ABC's contractual rights, because ABC legal counsel will be representing the ABC rather than any of the individual Members, representation by ABC counsel is clearly not prohibited by §17(c).

As to representation of an individual Member by ABC legal counsel in the second proposed action, we find that the exemption provided by §17(c) applies. Given the litigation strategy as you describe it, wherein ABC legal counsel will only advocate the limited issue of the Board's compliance with its own regulations and the eligibility of the individual Member as well as all other ABC special municipal employees for membership in the retirement system, we find that such legal representation is a proper discharge of the official duties of the ABC legal counsel, and therefore is exempt from the prohibitions of §17(c).<sup>5/</sup> As the Commission has previously held, where a public official seeks to challenge a law or regulation as it affects him in his official capacity, the official duties of a public agency's attorney can reasonably extend to cover representation of the individual public official in such a matter. *EC-COI-83-137*. Moreover, where as here, you have specified several credible benefits to the ABC and its special municipal employees as a class, we find that this particular lawsuit serves a distinct institutional interest. The proposed representation by the ABC's legal counsel will not therefore violate §17(c).<sup>6/</sup>

**Date Authorized: September 10, 1992**

<sup>1/</sup>We note that pursuant to G.L. c. 121B, §7, an attorney who performs professional services for a housing authority on a part-time, intermittent or consultant basis is a special municipal employee for purposes of G.L. c. 268A. However, the fact that the legal counsel is a special municipal employee has no bearing on the analysis contained herein.

<sup>2/</sup>"Particular matter," any judicial or other proceeding, application, submission, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, decision, determination, finding, but excluding enactment of general legislation by the general court and petitions of cities, towns, counties and districts for special laws related to their governmental organizations, powers, duties, finances and property. G.L. c. 268A, §1(k).

<sup>3/</sup>In *Commission Advisory No. 6 (Municipal Lawyers Representing Both a Municipal Employee and a Municipality in the Same Suit)*, the Commission concluded that "[a]s a matter of sound policy, . . . , the proper discharge of a municipal attorney's duties can also

reasonably extend to representing a municipal employee in the employee's official and individual capacity, provided that the appropriate authorization has been given by the attorney's appointing official." We note however, that the advice contained in this Advisory pertains to a municipal official being sued in both his official and individual capacities. Because the circumstances surrounding representation by the ABC attorney are distinguishable, we will not rely upon Advisory No. 6, nor should this opinion be read to alter the advice contained in that Advisory.

<sup>4</sup>Section 17(a) prohibits compensation from third parties unless it is provided "**by law** for the proper discharge of official duties" (emphasis added). Therefore, § 17(a) will prohibit ABC's legal counsel from receiving private compensation from the individual Member as well as the ABC, absent a statutory provision or by-law allowing such receipt of compensation. See *EC-COI-92-10* n.5. See also *EC-COI-88-6* (§ 17 [a] prohibits town counsel from receiving private compensation for representing town official in State Ethics Commission enforcement proceeding).

<sup>5</sup>You tell us that representation of the individual Member as to any issues beyond the limited question of law which affects all of the ABC's special municipal employees will be handled by the Member's personal legal counsel.

<sup>6</sup>This opinion is limited to the application of G.L. c. 268A to the circumstances described. In other words, nothing in this opinion should be construed as commenting on permissibility of the proposed representation of the individual Member under the disciplinary rules governing the conduct of attorneys. You should therefore inquire of the Board of Bar Overseers or the Massachusetts Bar Association whether the proposed representation by the ABC's legal counsel will be prohibited by any of the restrictions on the conduct of attorneys.